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COURT OF CRIMINAL APPEALS
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PATRICK JORDAN
vs.
THE STATE OF TEXAS

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS FOR THE SIXTH
JUDICIAL DISTRICT AT TEXARKANA
No: 06-17-00161-CR

ON APPEAL FROM
THE 202ND DISTRICT COURT, BOWIE COUNTY, TEXAS
No: 15F0716-202

APPELLANT PATRICK JORDAN'S BRIEF ON APPEAL

Oral argument is requested.

Bart C. Craytor SBOT# 24014210
126 W. 2nd Street
Mount Pleasant, Texas 75455
Tel: 903-293-7729
Fax: 866-314-2960
Email: bcraytor@gmail.com
Attorney for the Appellant/Petitioner

IDENTITY OF THE PARTIES, COUNSEL AND JUDGES:

Appellant/Petitioner
Patrick Jordan

Counsel for the Appellant/Petitioner (Trial and Appeal)
Bart C. Craytor

Counsel for the State
Jerry W. Rochelle, District Attorney
Michael Shepherd, Assistant District Attorney
Kate Curry Carter, Assistant District Attorney
J. Randel Smolarz, Assistant District Attorney

Trial Court
Judge John Tidwell

Justices of the 6th Court of Appeals
Josh Morris III, Chief Justice
Bailey Mosley, Justice (author)
Ralph Burgess, Justice (dissenting from denial of motion for *en banc* rehearing)

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To the Honorable Judges of the Court of Criminal Appeals:

Patrick Jordan, Appellant, presents this Brief on Appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. The Appellant's petition presents issues of first impression, conflicting precedent; accordingly, Appellant believes that oral argument will facilitate this Court's decisional process.

STATEMENT OF THE CASE

On May 19, 2016 the State indicated Patrick Jordan (hereinafter "Appellant") for aggravated assault with a deadly weapon and three counts of deadly conduct[1]. [CR18] (Two counts were abandoned at trial.) Appellant was simultaneously indicted for aggravated assault with a deadly weapon in a companion indictment in Trial Court Cause No. 15F0717-202[2]. Appellant plead not guilty to both indictments. The cases were consolidated for trial which began May 23, 2017. [2 RR 4] On May 26, 2017, the jury found Appellant guilty of the offense of deadly conduct (also finding a deadly weapon was used) and was unable to render a verdict on the aggravated assault with a deadly weapon charge. [5 RR 16-17] The jury assessed punishment on the deadly conduct charge at four years in the Institutional Division of the Department of Criminal Justice and no fine and the

[1] Tex. Penal Code § 22.05
[2] Tex. Penal Code § 22.02

court sentenced accordingly. [CR 150] Appellant moved for a New Trial on June 21, 2017 which was overruled by operation of law. Appellant timely filed a Notice of Appeal on August 17, 2017.

PROCEDURAL HISTORY

The appeal was lodged in the Sixth Court of Appeals. On June 5, 2018 the intermediate-appellate court issued its first-published opinion in Appellant's case. *Jordan v. State*, ____ S.W.3d ____. No. 06-17-00161-CR, 2017. (June 5, 2018). On June 19, 2018 Appellant filed his motion for rehearing *en banc*. On July 24, 2018 the intermediate appellate court denied the motion for rehearing, however Judge Burgess issued a dissenting opinion to the motion for rehearing stating that Appellant "raises several novel issues worthy of review." [No: 06-17-00161-CR (Sixth Court of Appeals dissenting opinion)].

Appellant sought an extension of time in which to file a Petition for Discretionary Review with the Court of Criminal Appeals on August 24, 2018. The Court granted Appellant until September 24, 2018 in which to file his Petition for Discretionary Review.

STATEMENT OF JURISDICTION

Pursuant to Texas Rules of Appellate Procedure 66.3, Appellant offers the following:

A. The justices of the Sixth Court of Appeals court's opinion conflicts with other appellate court's opinions. (This question asks what quantum of evidence is necessary for a defendant to produce to demonstrate an individual is an assailant). [See Judge Burgess' Dissenting Opinion to the Motion for Rehearing.]

B. The Sixth Court of Appeals has decided an important question of state or federal law that should be settled by the Court of Criminal Appeals. (Does the law justify the use of deadly force against assailants when the primary assailant only displayed his fists?) [See Judge Burgess' Dissenting Opinion to the Motion for Rehearing.]

GROUNDS FOR REVIEW

Issue One

What quantum of evidence must the accused present to avail himself of self-defense/defense of others when the alleged victim was not a primary threat.

Issue Two

Does a Defendant's intent to exercise self-defense/defense of others transfer to other assailants when the Defendant is confronted only with the fists of the primary threat?

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

The Appellant asserted these facts at trial:

A. The move.

Patrick Jordan, Appellant, was finishing his move from Texarkana, Texas back to Broken Bow, Oklahoma. [3 RR 12, 204, 212; 4 RR 20, 24, 35, 72, 80] He and his friend Cody Bryan (hereinafter "Bryan") had returned the U-Haul rental and finished packing the last items in Appellant's apartment. [4 RR 80-81] Among the items was a small pistol Appellant kept in his nightstand which he placed in his pocket. [4 RR 21] Bryan and Appellant left the apartment and started to leave Texarkana to Broken Bow. [3 RR12, 212]

B. The search for nutrition and refreshment

The two decided to grab a bite to eat on their way out of town. They initially considered a sushi restaurant however it was closed. They then decided to go to another restaurant (the Silver Star) further along the way out of town where Appellant knew a waitress, Summer Varley (hereinafter "Varley"). [4 RR 22-23]

Appellant sent a text message to Varley and inquired if she was working that evening. She was not working, however she advised that she was at the restaurant and he could buy her a drink. [5 RR 21 (State's Exhibit 17)]

C. The initial encounter with Royal

As Appellant and Bryan approached the entrance to the Silver Star, Jordan Royal (hereinafter "Royal") advised Appellant to leave Varley alone. Appellant advised Royal that they were just there to eat. [4 RR 28-30] Royal was accompanied by Joshua Stevenson (hereinafter "Stevenson") at the door as Appellant and Bryan approached. [4 RR 30]

D. The confrontations in the restaurant

Appellant and Bryan were seated in the main restaurant area of the Silver Star. [4 RR 30] Royal, Austin Crumpton (hereinafter "Crumpton"), Damon Prichard (hereinafter "Prichard"), Stevenson, and Varley were patronizing the bar area within the Silver Star. [3 RR 67, 97; 4 RR 86, 89, 97; States Exhibit 7] Prichard left the bar area and confronted Appellant and Bryan at their dining area table. [3 RR 113] Prichard stated they had something for him outside. [3 RR 196] Varley individually left the bar area to confront Appellant and Bryan at their table. [4 RR 33, 64] Varley was mad at Appellant, called him an "a__hole" and stated that he shouldn't expect to come here and not expect anyone to be upset about that. [4 RR 75] Prichard's confrontation and Varley's comments made them feel uneasy and they decided to leave. [4 RR32] They cancelled their food order and paid their bill for their refreshments. [4 RR 31]

E. Getting out of "Dodge"

As Appellant and Bryan left the restaurant, they were encountered by Royal, Crumpton, Varley, Stevenson and Prichard immediately at the door. [6 RR 12; States Exhibit 8; 6 RR 38-39 Defendant's Exhibits 15 & 16] Appellant and Bryan headed straight to their car. [4 RR 37, 65] Royal and his crew began their pursuit of Appellant and Bryan into the parking lot. [4 RR 38, 65; States Exhibit 8]]

F. We are being mobbed

Royal caught up to Bryan and Bryan ended up being immediately knocked out by Royal's fists. [3 RR 91, 116, 134; 4 RR 37-38] Crumpton and Prichard ran over to Bryan and stood over Bryan. [4 RR 37-38] Bryan immediately lost consciousness and suffered broken bones in his skull from Royal's assault upon him. [4 RR 92] Appellant turned and saw Bryan laying on the pavement and again began to retreat when Royal and his entourage resumed pursuit. [4 RR 37-38, 67] Royal caught up with Appellant first and fish-hooked Appellant's eye with his hand. [4 RR 38, 39][3] Varley was immediately behind him allegedly trying to pull Royal off Appellant. [3 RR 193]

[3] According to Appellant. Royal's testimony differed greatly, however what is relevant here is the threshold of Appellant's burden to be entitled to a self-defense/defense of others or justification jury charge. Admittedly the Statement of facts is biased toward Appellant.

G. Caught in retreat

Appellant, while being physically assaulted by Royal, retrieved the pistol which remained in his pocket from the move. [4 RR 47] Appellant utilized the pistol to defend himself against the assaults, and in the process discharged the weapon at least three times. [4 RR 40] A bullet struck a car in the parking lot. [3 RR 153-154] A bullet struck Varley as she was in the fray. [3 RR 154] One bullet struck Royal in the upper leg/groin area stopping his assault of Appellant. [3 RR 154]

HARM ANALYSIS

Appellant was harmed by the exclusion of his only defense as the State argued in closing that it was not required to disprove a defense theory. [4 RR 128]. Without proper instruction, the Jury could not reach a verdict on the aggravated assault with a deadly weapon count, yet the jury did convict on the deadly conduct with a deadly weapon count. The trial court did not properly instruct the jury that the law requires the State to disprove self-defense beyond a reasonable doubt as being the law in Texas. Because of the faulty jury charge, and the exclusion of the Appellant's right to assert self-defense in this situation by the Sixth Court of Appeals, the issue of a proper self-defense instruction left Appellant without his fundamental—and only—defense, self-defense.

This Court has examined these issues in the recent decision of *Rogers v. State*, 550 SW 3d 190 (Tex. Ct. Crim. App.s 2018) There, this Court aptly stated:

> The trial court's embargo of the defensive issues left Appellant with a single path to acquittal of burglary: Sandra's consent. The jury was prevented from fairly considering the issue because the State erroneously claimed that Sandra's consent was irrelevant. That claim was superficially supported by the application paragraph and by Appellant's admission that he had no consent from the named complainant to enter the house. Further, the trial court excluded the proffered corroboration of Appellant's testimony about Sandra's consent, a ruling that the prosecution exploited by arguing that Appellant was the sole source of testimony about Sandra's consent. The State further undermined the jury's fair consideration of the consent issue by conflating consent to enter with consent to commit a crime. Given these circumstances, the jury's implicit rejection of Appellant's claim about Sandra's consent does not support a conclusion that it also would have rejected his justification defenses.
>
> Similarly, the jury's punishment verdict is not persuasive evidence of harmlessness of any guilt phase jury charge error since the jury's assessment of Appellant's blameworthiness was made without any consideration of the defensive evidence. Deprived of any mention of possible defenses, the jury could not have made an informed decision about blameworthiness.
>
> On this record, the trial court's refusal to instruct the jury on the defensive issues, assuming it was error, was calculated to injure the rights of the defendant.
> *Rogers* at 196

ARGUMENT

General Principles

In the Declaration of Independence, the Founding Fathers spoke of certain "unalienable rights" inherent to the people against the tyranny of British rule. Chief among these rights is the right to life. *See* The Declaration of Independence[4] The right to life encompasses much within its ambit. By reading it in context with Constitutional protections such as the right to bear arms (which includes self-defense, *See District of Columbia v. Heller*, 554 US 570 (2008)) and the right to due process, the right to life is fundamental to our system of justice. Due process is implicated when an individual has the innate and natural right to defend himself against violence.

> *"Liberty" in the Due Process Clause protects "the right of self-defense against unlawful violence."*
> *Thomas Cooley*
> General Principles of Constitutional Law of the United States, (Rothman & Co. 1880)

These concepts predate the Declaration of Independence. "Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of the self-preservation, commonly called the first law of nature." Samuel Adams, *The Rights of the Colonists: The Report of Correspondence to the Boston*

[4] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Town Meeting, Nov. 20, 1772. It is this backdrop in which we contemplate the individual arguments.

> "The right to claim self-defense is deeply rooted in our traditions. See *Montana v. Egelhoff*, 518 U.S. at 43, 116 S.Ct. (2013) ("Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice"). Blackstone referred to self-defense as "the primary law of nature," and claimed that "it is not, neither can it be in fact, taken away by the law of society." 3 William Blackstone, Commentaries, *4. According to him, the common law "held [self-defense] an excuse for breaches of the peace, nay even for homicide itself." Id.; see also 4 id. at *183-87. It is a well-established rule in federal criminal trials that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," including the defense of self-defense. *Mathews v. United States*, 485 U.S. 58, 63-64, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); see also *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896). Even in *Egelhoff*, a case taking a decidedly narrow view of which rights are "fundamental," the Court commented that "the right to have the jury consider self-defense evidence" may be a fundamental right. *Egelhoff*, 518 U.S. at 56, 116 S.Ct. 2013 (Scalia, J., plurality opinion). We know of no state that either currently or in the past has barred a criminal defendant from putting forward self-defense as a defense when supported by the evidence."
> *Taylor v. Withrow*, 288 F.3d 846 (6th Cir., 2002)

This Court has a unique opportunity to examine the law regarding the justification of ones conduct (the use of deadly force) to avoid a harmful or offensive assault. It presents the unique question of the limits of a person's ability to act in self-defense when the aggression against him utilizes no other weapons other than those endowed to men by nature. It asks at point the jury should be

instructed to consider the law of self-defense and the use of deadly force in the protection of the self and others.

First Argument

FIRST ISSUE PRESENTED

On appeal, Appellant argued that he was entitled to an instruction on self-defense, defense of others for justification of his deadly conduct. The jury was not instructed, although a prior assault by fists left his companion knocked out cold in a parking lot and the Appellant was running from his assailants. This issue asks what is the proper quantum of evidence necessary to avail an accused to a self-defense (defense of others, necessity, or justification) jury charge when the alleged victim was not a primary assailant[5]?

Reasoning not from treatises, English precedents, or contemporary state decisions, and aiming instead for "rules consistent with human nature," Justice Oliver Wendell Holmes illuminated the question of retreat in the famous phrase, "detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S.335, 343 (1921). While there was no “uplifted knife” in this case, there certainly was a showing of physical dominance and a continuing threat to Appellant and his companion. The intermediate appellate court declined the Appellants first six points of error on the conclusion that self-

[5] Even though Varley, Crumpton, Prichard and Stevenson did not appear to be a primary threat to Appellant and Bryan, they were participants and changed the dynamics of the situation.

defense does not apply when the Appellant was pursued by an aggressive group, three who had previously confronted Appellant.

The Fourteenth Court of Appeals addressed this issue in *Dugar v. State*, 464 SW3d 811 (Tex. Ct. App—Houston pet. refused 2015). The decision conflicts with opinion below. In *Dugar* the court of appeals reversed the trial courts exclusion of a self-defense instruction where the victim was merely in a car along with others pursuing the defendant who was, perhaps not necessarily an innocent bystander, but at a minimum, a participant in the fray. The Fourteenth Court of Appeals reversed the trial court's reasoning as being "too narrow."[6] *Dugar* at 817. The *Dugar* court additionally added: "The State seems to contend that an actual danger is required before a person may act in self-defense. But again, that view is too narrow." *Dugar* at 818.

> "A person has the right to defend himself from apparent danger to the same extent as he would if the danger were real." *Hamel v. State*, 916 S.W.2d 491, 493 (Tex.Crim.App.1996). Thus, under certain circumstances, a person may use deadly force against another, even if the other was not actually using or attempting to use unlawful deadly force. See *Jones v. State*, 544 S.W.2d 139, 142 (Tex.Crim.App.1976) ; see also *Burke v. State*, 652 S.W.2d 788, 790 (Tex.Crim.App.1983) (noting that a person is not required to wait until he is actually attacked before he may lawfully protect himself), superseded by rule and on other grounds as stated in *Whiting v. State*, 797 S.W.2d 45 (Tex.Crim.App.1990). The only requirement is that the person must

[6]"The State argues on appeal, as it did at trial, that there is no evidence to support a self-defense instruction because the record shows that appellant did not face an immediate threat from the complainant individually. We do not take such a narrow view of the right to self-defense." *Dugar* at 817

> be justified by acting against the danger "as he reasonably apprehends it." See *Hamel*, 916 S.W.2d at 493 ; see also *Dyson v. State*, 672 S.W.2d 460, 463 (Tex.Crim.App.1984) (noting that the defendant would be entitled to a self-defense instruction if he reasonably believed that his brother was using or attempting to use unlawful force, and it was "immaterial" that the defendant was not in fact attacked by his brother)."
> *Dugar* at 818

If a defendant can avail himself of a self-defense instruction when dealing with an innocent bystander as in *Jackson v. State*, 147 SW 589 (Tex. Ct. Crim. App. 1912)[7], then Appellant is entitled to his instruction here. The issue had already become the "law of the case" as to the aggravated assault with a deadly weapon. Here as in *Jackson* the issue of self-defense transfers to the "innocent bystander." It was established by the trial court that self-defense was applicable to the aggravated assault with a deadly weapon charge where he gave an instruction on self-defense and an application paragraph. [CR 134] (Although it did not comport with the law as the jury was not instructed that the State must show self-defense is not available beyond a reasonable doubt.)

Justification or necessity defenses excuse the conduct of the defendant, not the result of the conduct. If a person acts within reason, and not recklessly, self-defense, consistent with the right to life and the first law of nature, (self-preservation) establishes the availability of self-defense. An individual placed in

[7] Cited in *Dugar v. State*, 464 SW3d 811 (Tex. App.—Houston pet. denied 2015)

the decision of bodily integrity or suffering the pain of an unlawful battery is not required to suffer at the hands of his unprovoked assailant.

One can see the struggle as the jurors wrestled with the issue on the aggravated assault charge and failed to find a verdict. The prosecutor then made a manifest mis-statement of the law that the state is not required to disprove a defense theory in his closing argument. [4 RR 128] And the jury was not instructed according to law as requested by Appellant.

Second Argument

SECOND ISSUE PRESENTED

> Appellant raised the issue that he and his companion were facing multiple assailants. There was evidence of a party of five individuals pursuing Appellant through the parking lot. However, the primary assailant was merely asserting physical superiority. This issue asks what quantum of violence must be raised to allow a defendant to claim self-defense against others?

The State alleged Varley and Crumpton, were victims of the offense deadly conduct. At trial, the Appellant put on evidence indicating Varley and Crumpton were not necessarily innocent bystanders, but possibly accomplices of Royal by aiding, abetting, encouraging, supporting Royal's pursuit of Appellant and Bryan through the parking lot and the anticipated physical conflict. The Appellant produced at least some evidence that Varley was the one initiating Royal's confrontation with Appellantif you consider her testimony regarding her statement

that you can't be an a__hole to me and not expect my friends to be upset and that she was mad at him [4 RR 75].

For the sake of argument consider Varley and Crumpton as innocent bystanders. Appellant's intent to utilize self-defense against Royal excuses his conduct, not the result of his conduct. Self-defense would be valid against murder as well as a mere assault. Two very different results, but the Appellant's conduct is what is justified under our law under self-defense and/or necessity. This doctrine justifies the conduct of the Appellant even when the alleged victim is one other than the primary threat? Appellant claimed self-defense to justify his conduct, even as to Varley and Crumpton because of the fear Appellant was facing from Royal and his posse (of which he considered them members). The Appellant is entitled to the same standard entitling him to a self-defense instruction to Varley and Crumpton as to Royal.

A defendant has the burden of producing sufficient evidence at trial that raises the issue of self-defense to have that issue submitted to the jury. *See Davis v. State*, 268 S.W.3d 683, 693 (Tex.App.-Fort Worth 2008, pet. ref'd); *Hill v. State*, 99 S.W.3d 248, 250-51 (Tex.App.-Fort Worth 2003, pet. ref'd) (explaining that if there is evidence supporting a self-defense theory, an instruction to the jury is required whether such "evidence is weak or strong, unimpeached or contradicted,

and regardless of what the trial court may or may not think about the credibility of the defense").

The opinions in the cases of *Dugar, Hamel, and Jackson* support the proposition that a person is entitled to claim self-defense based upon his reasonable assessment of apparent danger. Presiding Judge Keller's concurrence in *Dickey v. State*, 22 SW3d 490 (Tex. Crim. App. 1999) supports the doctrine of "complicity with those that threatened the defendant's life." If a defendant is entitled to utilize self-defense in response to a perceived threat, justification is available against all persons involved not merely the primary antagonist. One must be mindful of Holmes' dictum regarding "detached reflection" in *Brown*. This is especially true when the defendant is embroiled within a physical conflict. A defendant should not be denied his self-defense instruction merely because his exercise of force in defense of himself was less than perfect.

> "This court has held that the right of self-defense obtains against **any character of unlawful attack**, and that in a proper case it is error to restrict the right of self-defense, as was done in this case. The jury may have believed that Davis was about to attack appellant with the poker, or that it so appeared to appellant from his standpoint, and he would have the right to defend himself against such unlawful attack, even though he did not believe it would result in the loss of life or serious bodily injury to him. In a proper case the court might be called on to charge on the use of excessive force, but the right of self-defense should not be improperly restricted."
> *Maynard v. State*, 265 S.W. 167, 98 Tex. Cr. R. 204 (Tex. Crim. App., 1924) [emphasis added]

This rule is doubly applicable when the so-called "bystanders" are actively engaged in conduct which supports or abets the primary aggressor.

Regardless of whether they were assailants or victims, the seven individuals Royal, Stevenson, Prichard, Crumpton, Varley, Bryan, and Appellant were all participants in the incident in some form or fashion. Five had a choice to not encourage, provoke, promote or seek violence. Royal, Stevenson, Prichard, Crumpton and Varley were grouped together throughout the afternoon. Three of those five confronted Appellant and Bryan causing concern. Only Appellant and Bryan attempted to avoid conflict in that parking lot by retreating to their car. However, violence caught up to them, and their attempts to escape unscathed were frustrated by the five.

CONCLUSION AND PRAYER

Issue One Conclusion

The Appellant's exercise of self-defense is available even when his exercise of self-defense is not perfect. The Appellant raised sufficient evidence to get a self-defense instruction as to the primary threat, Royal and is entitled to the same as to Varley and Crumpton. This is notwithstanding the Royal's only show of force was physical superiority. It is a fact issue for the jury to determine the reasonableness of the defendant's conduct, the participation of any secondary threats or whether the defendant was reckless in the exercise of self-defense.

Issue Two Conclusion

Sufficient evidence at trial was raised to show the complicity of the five individuals throughout the night as they sat in the bar. Three of the five, including Varley, confronted the Appellant and Bryan in the restaurant. (Calling him an "a__hole" and that he should expect consequences for the way he treated her.) Stevenson, Prichard and Crumpton following Royal into the parking lot after Appellant and Bryan. Where there is evidence that they intended on encouraging violence, and appearing to be complicit in aiding, abetting and supporting Royal's use of violence, all following Appellant and Bryan through the parking lot. Appellant's use of self-defense was available as to Varley and Crumpton, especially since he was entitled to self-defense against Royal.

The conflict between the courts needs to be resolved as the citizens and courts of Texas seek guidance regarding the extent of protection that self-defense justifies the conduct of the accused, even against innocent bystanders or as to what quantum of evidence is required to excuse a result of the exercise of self-defense, even if it was not intended against the particular complainant. This is especially true where multiple assailants appear to be joined with the primary antagonist. Multiple assailants increase the fear factor exponentially and take the school house tussle between two individuals to the fear of a lynching in the streets.

The denial of Appellant to a jury charge in such instances leaves him defenseless and a trial that is fundamentally unfair.

Prayer

The Appellant, Patrick Jordan respectfully requests that this Honorable Court will grant his Petition for Discretionary Review.

Respectfully Submitted:

Bart C. Craytor, SBOT# 24014210
126 W. 2nd Street
Mount Pleasant, Texas 75455
Tel: 903-293-7729
Fax" 866-314-2960
e-mail: bcraytor@gmail.com
Attorney for the Appellant/Movant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the forgoing Motion was served upon the office of the Bowie County Criminal District Attorney's Office on this the 20th day of February 2019 via facsimile and e-service and to the office of the State Prosecuting Attorney via information@spa.texas.gov.

Bart C. Craytor

CERTIFICATE OF COMPLIANCE

This is to certify that this petition complies with Rule 9.8 of the Texas Rules of Appellate Procedure because it is computer generated and contains 4846 words of the allowed 15,000 according to its wordcount calculator. This pleading also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

Bart C. Craytor

Appendix